INCOME-TAX AMENDMENT.

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IT is persistently urged that by adopting the proposed constitutional amendment providing for the levying of an income tax without apportionment some new or additional taxing power will be conferred upon Congress, some limitation placed upon the powers of the State. Many are led to believe that we are in effect readjusting the taxing power as between the national and the State governments. With much apparent earnestness a warning is sent forth from certain sources every few days that the States should look well to this attempt to take away some of their present power. Even so profound a constitutional lawyer as ex-Senator Edmunds says, in an article lately printed in the "Congressional Record": "In so sweeping and unlimited a form (is the proposed amendment) as to grant Congress the right to tax the very States themselves by impositions upon their bonds and other sources of revenue. . . . For what reason is this great and radical change and surrender proposed?"

What "radical change" is to be made, what "surrender proposed"? I submit that the position thus taken by the ex-Senator cannot be sustained either upon reason or authority.

Is there any doubt in the mind of any lawyer, or layman for that matter, who has considered the subject, that Congress has power to levy an income tax now—under the Constitution as it at present exists? May we not, if we apportion the same, levy an income tax at the present time? Congress has the power now to do precisely that which is deemed revolutionary and destructive to the States. There has never been any difference of opinion among lawyers or in the decisions as to the power of Congress to levy an income tax. The sole question has been as to whether it should be apportioned or not, and the sole purpose and only effect of the amendment is to relieve from the necessity of ap-

portionment. There was no necessity for any extension of power, but there was a necessity from a practical standpoint for changing the rule for the exercise of a conceded and unlimited power.

There is no kind of property, no income "from whatever source derived," which will be subject to taxation after the adoption of the amendment without apportionment which is not at the present time subject to taxation with apportionment. The taxation of State bonds and other securities will be no different with the amendment than without it. The Constitution says: "The Congress shall have power to lay and collect taxes, duties, imposts and excises," etc. Is there any kind of property or any kind of income, "from whatever source derived," excepted by this clause? If certain kinds of incomes are excepted, such as income from State bonds and other securities, where is the language or rule of construction which excepts them? Has any court ever intimated that in the taxing clause of the Constitution is to be found any exception as to incomes from State bonds or incomes "from whatever source derived"? On the other hand, from Marshall to Chief-Justice Fuller and Associate-Justice White in the Pollock case, it has been announced too often for reference that the taxing power as contained in the taxing clause of the Constitution is unlimited, unfettered, covering all kinds of property and all kinds of incomes. There is no doubt, if the taxing clause of the Constitution were construed standing alone and without regard to the fact that it is a part of an instrument of government and without regard to the scope, scheme and plan of the instrument, that Congress would have the absolute power to tax the incomes of State bonds and other securities upon the same being apportioned. And if we should go back prior to 1894 and follow the rule given us by the courts for nearly a hundred years we would have the right to tax them without apportionment.

Nevertheless, the Supreme Court has held that whether apportioned or not you cannot tax State bonds or any of the instrumentalities of the States. Not because the taxing power as quoted is not full and complete, but because this power must be construed in the light of the Constitution as a whole—its scope, purpose and design. The scope, purpose and design of the instrument are to create two separate, and within their granted and reserved powers, independent sovereignties. And it follows necessarily that neither should and that neither does have the

power to embarrass or destroy the other. In other words, that there must always be subtracted from this unlimited taxing power, plenary though it be, the right of a State government to exist and perform its functions. Upon this principle and upon this principle alone the instrumentalities of the States are exempted. Marshall, when confronted with the claim of the States of the right to tax the instrumentalities of the national Government, boldly stated that no provision of the Constitution could be found to prohibit such taxation. But said the justice: "There is no express provision (of the Constitution) for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."

Later, when the question was presented as to the power of the Government to tax the instrumentalities of the States, the court was met with the rule long established that there was no limit to the taxing power of Congress. "That it might be exerted upon all individuals and upon every species of property" was conceded. If so, upon what theory was the income from State bonds or State officials' salaries to be exempted? Solely upon the theory that these sovereignties were in their spheres independent, and that the "admittedly unlimited power" to tax related alone to the property or incomes from sources within the jurisdiction of the sovereignty laying the tax. That the State government and its instrumentalities of sovereignty were not within the jurisdiction or subject to the control of the national Government was the conclusion reached. The court said:

"It is admitted there is no express provision in the Constitution that prohibits the general Government from taxing the means and instrumentalities of a State, nor is there any prohibiting the State from taxing the means and instrumentalities of the Government. In both cases exemption rests upon necessary implication and is upheld by the great law of self-preservation, as any Government whose means employed in conducting its operations, if subject to the control of another and distinct Government, can exist only at the mercy of that Government."

It will be recalled that the income tax of 1864 covered specifically incomes from State securities and the salaries of State officers. This law was held constitutional. That is, it was held that the tax need not be apportioned. There was, therefore, before the

court precisely the situation we would have should this amendment be adopted and the rule of apportionment discarded. We had an income-tax statute specifically covering the subject-matter of incomes from the State securities, and we had numerous decisions of the Supreme Court to the effect that the taxing power of Congress was plenary and yet the court held that you could not tax State securities or bonds. Did the court so hold upon the theory that State bonds were excepted from the taxing power under the Constitution, or that the language of the taxing power was not sufficient to cover the same? By no means. On the other hand, in this very decision, it is said that there was no limitation to the taxing power of Congress. Did it hold this because the statute itself did not cover this kind of property? By no means. The effect of those decisions was that, notwithstanding the unlimited taxing power of Congress when standing alone, it must be construed in the light of the fact that we have a dual Government. The decision was based upon the law of self-preservation—the whole scope and plan of Government as outlined in the Constitution being that there were two separate and distinct sovereignties unembarrassed by each other.

Let us suppose that this amendment is adopted and Congress should pass a law levying an income tax upon the income from State bonds. It would then be said that a statute covering this specific kind of property passed under an amendment covering incomes "from whatever source derived" would certainly authorize the tax. But could it not be said in complete answer to this that upon several previous occasions Congress had passed a statute taxing incomes from State bonds under a constitutional provision which the court had held covered property of every nature and kind, but that aside from the plenary power of taxation and the specific provisions of the statute there was another principle which must obtain when construing the Constitution providing for a dual form of Government and that that principle remains intact? The court did not hold, for instance, in the Pollock case that the income tax on State bonds was void because it was unapportioned. It held, notwithstanding the language of the statute and the plenary power of the Constitution under which it was passed, that the national Government could not tax these State bonds for the reasons theretofore announced in the case of Collector *vs.* Day and above quoted.

Apply *this* test to the argument of those who oppose the amendment: What power would the national Government have after the adoption of this amendment that it has not now? None. It will have precisely the same power to tax to cover the same kind of property, but without apportionment. On the other hand, what power has the State now that it would not have after the amendment was adopted? None. The rule under which the State bonds and State instrumentalities have been exempted for a hundred years from taxation is untouched and unchanged by this amendment. The reasons upon which the opinions are based holding them exempt would be precisely the same after as before the adoption of the amendment.

Is it not incumbent upon those who say that by adopting this amendment we will be able to tax State bonds and State instrumentalities to show as a basis for their contention that the reason why we have not been permitted to tax them heretofore is because there was an exception found in the taxing clause of the Constitution or because there was a limitation as to kinds of property to be taxed? They can show neither. Even in the Pollock case Justice Fuller said that, save as to exports, the taxing power of Congress "reaches every subject and may be exercised at discretion." Justice White said in the same case: "It is unquestioned that the provisions of the Constitution vest in the United States the plenary powers of taxation, and all we have to determine," continues the Justice in that powerful dissenting opinion which has never been answered and never will be, "is not the existence of a power, but whether an admittedly unlimited power to tax has been used according to the instructions as to method." The majority and the minority were a unit as to the plenary power of Congress to tax; also a unit that, notwithstanding this plenary power, you could not tax State bonds apportioned or unapportioned. If the power to tax is complete and unfettered, covering all subjects and every kind of property, will this amendment add anything to it?

In this connection, in view of the holding of the court as to the extent of power now in Congress to tax, do the words "from whatever source derived" therefore add anything whatever to the strength or amplitude of the amendment? Do they include any property or kind of property not already included? For instance, if the amendment read: "Congress shall have power to lay and

collect taxes on incomes without apportionment," would it not cover all incomes just as fully as the words "from whatever source derived"? Has it not been held universally that the words "Congress shall have power to lay and collect taxes" cover property or incomes from whatever source derived? So far as this clause itself is concerned, the words "from whatever source derived" are included in the general clause because it covers everything without exception. I grant that there was no need of using the words, and that it would perhaps have been better not to do so. It is never well to coin phrases when you know precisely what you wish to accomplish and have the phrases well embodied in the law and their meaning thoroughly established, at hand for ready use. But possibly this happened by reason of the manner in which the amendment came in. This amendment and the corporation tax were the twin children of legislative necessity. Those of us who favored the amendment to the tariff bill providing for an income tax, believing the court would reverse the Pollock case if the question were resubmitted, had secured enough votes to pass the amendment. Something had to be done. So this amendment and the corporation tax were brought in as a substitute, with the understanding and notice served that both had been formulated in the region of the immaculate and both were clothed and accompanied by the sustaining benediction of those who could not err and that no changes in the amendments were to be contemplated for a moment. And thus with that solemn and serious but complacent consideration which always obtains when divine things are passing by they went through the Senate.

Some seem to think that this amendment foreshadows an assault upon wealth. No sane man would take from industry its just reward or rob frugality of a fair and honest return. I believe in protection to wealth legitimately acquired and the absolute guarantee to property and property rights. These things are essential to the welfare of those who do not possess property as well as those who do, and no man would render them less efficient than they now are. But equality of burden and equal opportunity in the struggle for existence are also essential to any successful and continued plan for the protection of wealth and property. We lose sight of the fact that, after all, in a Government like ours statutes and constitutions cannot of themselves

protect property. In the last analysis property can only be protected through an intelligent, law-abiding and loyal citizenship. There is nothing in this world so blind, so incapable of appreciating the forces which in the end will destroy it as wealth. If it were not, it would realize that every time it invades the law of equal opportunity or the rule of equal burdens it is undermining its own stability and inviting its own ruin. Those who honestly and faithfully contend for the equal distribution of the great burdens of Government, year by year increasing, who seek to protect the less fortunate and prosperous against the unjust accusations of selfishness and greed, are the real friends of property and the true defenders of law and order. Such men have no fight upon honest wealth. They realize its value and would protect it. But they know also that the man who walked down Fifth Avenue a few nights ago, hungry and haunted by the cries of his children, and threw a rock at the feasters in a palatial hotel, can no more be ignored in considering policies than the greatest of magnates who wearies with the burdens of his wealth. There are those who even dare to believe that purely as a matter of safeguarding our institutions and of preserving the guarantees of property, to say nothing of the demands of humanity, the legislator should look first into the causes which brought to this citizen of ours enforced hunger and idleness and seek to remedy the same rather than to devote his entire time to throwing protection around the feasters.

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